Supreme Court, U.S.
FILED
JUN 6 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1372

In the Supreme Court of the United States

OCTOBER TERM, 1984

ELMER H. THOMASSEN AND JOAN THOMASSEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Andrews v. *South Dakota Student Loan Association Corp.*, 636 F.2d 233 3

Browder v. *Director, Illinois Department of Corrections*, 434 U.S. 257 3

Crateo, Inc. v. *Intermark, Inc.*, 536 F.2d 862, cert. denied, 429 U.S. 896 5

Long v. *Bureau of Economic Analysis*, 646 F.2d 1310, vacated, 454 U.S. 934 5

Lovitt, In re, 757 F.2d 1035 4

Mississippi Publishing Corp. v. *Murphree*, 326 U.S. 438 4

National Union v. *Arnold*, 348 U.S. 37 4-5

Shannon, In re, 670 F.2d 904 3

United States v. *Robinson*, 361 U.S. 220 3

Statutes and rules:

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 *et seq.* 3

§ 248, 92 Stat. 2672 3
§ 402(b), 92 Stat. 2682 3

11 U.S.C. 362(a) 2

11 U.S.C. 1101-1174 2

28 U.S.C. 2107 ..... 3, 5

28 U.S.C. (1976 ed.) 2107 3

Page

Statutes and rules—Continued:

Bankr. R. P. :

Rule 8015 ..... 3, 4
Rule 9023 4

Fed. R. App. P. 4(a)(4) .....

Fed. R. Civ. P. 59 4

Miscellaneous:

3 Sutherland, *Statutory Construction*, (4th ed. 1973) 4

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1372

ELMER H. THOMASSEN AND JOAN THOMASSEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the court of appeals' dismissal of their appeal for lack of jurisdiction, a dismissal predicated on petitioners' failure to file a timely notice of appeal.

1. Petitioners have outstanding federal tax liabilities in excess of $400,000 (Bkr. CR 1, Exhs. A, B).[1] In an effort to collect these taxes, the government obtained in the United States District Court for the Central District of California a judgment setting aside as fraudulent petitioners' conveyance of certain real property. The government also brought suit in the United States District Court for the District of Nebraska, seeking to set aside as fraudulent petitioners' conveyance of another parcel of realty to their son. *Ibid.*

---

[1] "Bkr. CR" refers to the docket control number assigned to documents in the original record by the clerk of the bankruptcy court. "CR" refers to the docket control numbers assigned to documents by the clerk of the bankruptcy appellate panel.

On January 30, 1980, petitioners filed a petition for a reorganization under 11 U.S.C. 1101-1174 of the Bankruptcy Code. The United States then commenced this adversary proceeding, seeking relief from the Bankruptcy Code's automatic stay provision (11 U.S.C. 362(a)) so that it might enforce the judgment it had obtained against petitioners in California and prosecute the fraudulent conveyance action it had pending against them in Nebraska. The bankruptcy court sustained the government's position and granted it the requested relief (Pet. App. A1-A3).

Petitioners appealed to the bankruptcy appellate panel of the Ninth Circuit. They failed to order a transcript and failed to file a timely statement of the issues. On June 3, 1983, some ten months after filing their notice of appeal, they sought and obtained an order excusing these failures (Bkr. CR 15, 21). They then failed to file a timely brief. On September 14, 1983, they sought an extension of time to file their brief (CR 8). They did not file a brief within the additional time they had sought. Instead, on October 17, 1983, they attached their brief to a motion for a further extension of time (CR 9). On December 27, 1983, the bankruptcy appellate panel denied petitioners' motions and dismissed their appeal (Pet. App. A4-A5).

On January 6, 1984, petitioners filed a motion for reconsideration, which they supplemented 11 days later (CR 15, 16). The bankruptcy appellate panel denied that motion on February 21, 1984, and awarded the government attorney's fees in the amount of $500 (Pet. App. A6-A7). On April 19, 1984, petitioners filed a notice of appeal to the Ninth Circuit (CR 20). Since their notice of appeal was not filed within sixty days of the date their case was dismissed by the bankruptcy appellate panel, the court of appeals, in an unpublished order, dismissed the appeal for lack of jurisdiction (Pet. App. A8).

2. The timely filing of a notice of appeal is " 'mandatory and jurisdictional.' " *Browder* v. *Director, Illinois Department of Corrections*, 434 U.S. 257, 264 (1978); *United States* v. *Robinson*, 361 U.S. 220, 224 (1960). The bankruptcy appellate panel's order dismissing petitioners' appeal was entered on December 27, 1983. Thus, under 28 U.S.C. 2107, as amended by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 *et seq.*, petitioners were required to file their notice of appeal within 60 days of that order, that is, by February 25, 1984.[2] Since petitioners did not file their notice of appeal until April 19, 1984, the Ninth Circuit correctly dismissed their appeal for lack of jurisdiction.

Petitioners' motion for reconsideration, which in substance was a motion for rehearing, did not extend the time for filing a notice of appeal. Rule 8015 of the Rules of Bankruptcy Procedure, which became effective on August 1, 1983, authorizes the filing of a motion for rehearing within ten days after the entry of judgment. The advisory

---

[2]Section 2107 of 28 U.S.C. generally provides that, in actions in which the United States is a party, a notice of appeal shall be filed within 60 days after entry of the judgment appealed from. Prior to its amendment in 1978, Section 2107 by its terms did "not apply to bankruptcy matters or other proceedings under Title 11" of the United States Code. 28 U.S.C. (1976 ed.) 2107. In the Bankruptcy Reform Act of 1978, however, Congress deleted this sentence. Pub. L. No. 95-598, Tit. II, § 248, 92 Stat. 2672. Although the amendment accomplishing the deletion was not expressly made effective until April 1, 1984 (Pub. L. No. 95-598, Tit. II, § 402(b), 92 Stat. 2682), the courts of appeals have held that Congress's failure to refer explicitly to 28 U.S.C. 2107 in the transition sections of the Bankruptcy Reform Act of 1978 was inadvertent. *In re Shannon*, 670 F.2d 904, 906 (10th Cir. 1982); *Andrews* v. *South Dakota Student Loan Assistance Corp.*, 636 F.2d 233, 235-236 (8th Cir. 1980). Thus, the court of appeals in the instant case correctly held that the 60-day rule of 28 U.S.C. 2107 was applicable here, even though the judgment appealed from was entered, and the notice of appeal due, prior to April 1, 1984.

committee note accompanying Rule 8015, however, states that a motion for rehearing does not extend the time for taking an appeal:

> The filing of a motion for rehearing does not toll the time for taking an appeal to the court of appeals from the district court or the bankruptcy appellate panel. * * * Rule 4 F[ed.] R. App. P. does not * * * contain any provision which stays or otherwise alters the time for taking an appeal to the court of appeals when a motion for rehearing is filed under Rule 8015 with the district court or bankruptcy appellate panel.

This comment of the advisory committee is sound and is entitled to weight in interpreting Rule 8015. See 3 Sutherland, *Statutory Construction* § 67.10, at 23 n.3 (4th ed. 1973); cf. *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438, 444 (1946). Petitioners' motion for rehearing accordingly did not extend the time for taking an appeal. See *In re Lovitt*, 757 F.2d 1035, 1038-1039 (9th Cir. 1985).[3]

Petitioners' suggestion (Pet. 22-24) that the court of appeals' dismissal of their appeal violated their due process rights is frivolous. Apart from the fact that due process does not mandate appellate review in civil cases (*National Union*

---

[3]There is no merit to petitioners' argument (Pet. 12-13) that Rule 8015's "silence" about the possibility of extending the time for taking an appeal creates "confusion." Only an explicit provision, like that in Fed. R. App. P. 4(a)(4) (concerning appeals from the district courts), has the effect of permitting a motion for rehearing to extend the time for taking an appeal, and petitioners point to no such explicit provision concerning appeals from bankruptcy appellate panels. Nor is there merit to petitioners' reliance (Pet. 16-17) on Rule 9023 of the Rules of Bankruptcy Procedure, which incorporates by reference Fed. R. Civ. P. 59. Rule 9023 is contained in Part IX of the Rules of Bankruptcy Procedure and, as such, is one of the general provisions that applies to trials in bankruptcy matters. The bankruptcy appellate panel was not sitting as a trial court and Rule 9023 thus had no relevance to petitioners' appeal.

v. *Arnold*, 348 U.S. 37, 43 (1954)), petitioners were not required to choose between prosecuting an appeal to the court of appeals and having their motion for rehearing considered by the bankruptcy appellate panel. They were free to pursue both avenues at once by filing a timely notice of appeal to the former and requesting a remand to the latter in the event that it was willing to entertain their motion for rehearing. See *Crateo, Inc.* v. *Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir.), cert. denied, 429 U.S. 896 (1976); *Long* v. *Bureau of Economic Analysis*, 646 F.2d 1310, 1318 (9th Cir.), vacated on other grounds, 454 U.S. 934 (1981).

Finally, there is no merit to petitioners' argument (Pet. 15-19) that their failure to file a timely notice of appeal was excusable because their attorney was misled by the Ninth Circuit's Clerk office about the filing deadline. Even if one were to assume (1) that bankruptcy appellate panels possess the authority (conferred on district courts by 28 U.S.C. 2107) to extend the time for filing a notice of appeal, (2) that petitioners should be deemed to have requested such an extension, and (3) that the reason for petitioners' failure to file a timely notice of appeal amounted to "excusable neglect," the filing deadline could have been extended only for a period of 30 days (28 U.S.C. 2107). Since petitioners' notice of appeal was due on February 25, 1984, a 30-day extension would have run only until March 27, 1984. Petitioners did not file their notice of appeal until April 19, 1984.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

JUNE 1985

DOJ-1985-05